

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

IBLA 82-37

Decided November 21, 1984

Appeal from a decision of the Montana State Office, Bureau of Land Management, granting a right-of-way M 51801.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Revised Statutes Sec. 2477

Where the State of Montana accepted a grant pursuant to sec. 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), otherwise known as R.S. 2477, repealed, sec. 706(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2793, for a highway right-of-way over public lands, the State's right-of-way remains in effect pursuant to sec. 701(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2786.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally -- Rights-of-Way: Nature of Interest Granted -- Rights-of-Way: Revised Statutes Sec. 2477

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, it is a question of Federal law. Rights-of-way obtained by a state pursuant to R.S. 2477 do not contain a legal right on the part of the state to grant third-party rights-of-way. Thus, appellant was required to obtain a right-of-way under 43 U.S.C. § 1761 (1982) to bury cable along an R.S. 2477 highway even though appellant had already obtained permission to bury the cable from the county.

APPEARANCES: Bruce G. Smith, Esq., Denver, Colorado, for appellant; A. Scott Loveless, Esq., Office of the Solicitor, Washington, D.C., for Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

Mountain States Telephone & Telegraph Company (Mountain Bell) appeals a decision dated September 10, 1981, issued by the Montana State Office, Bureau of Land Management (BLM), which granted Mountain Bell a right-of-way across public land. The decision granting the right-of-way cites as authority for the grant Title V of the Act of October 21, 1976, 43 U.S.C. § 1761 (1982), and the applicable regulations at 43 CFR 2800 (1980). The grant was made subject to a stipulation that Mountain Bell be allowed to appeal the issue of whether BLM had authority to require Mountain Bell to obtain a grant prior to installation of a buried telephone cable across public land.

Mountain Bell proposed to place a cable within the right-of-way of Route 361 which by entry in the County Commissioners Journal of Madison County, Montana, dated December 13, 1887, was established as a public county road (Exh. A of Statement of Reasons). On July 1, 1976, the road was designated as a Federal aid secondary road; however, the road continues to be maintained by the county. Verbal approval was granted by the county to Mountain Bell for construction of the facility, and construction on the roadway as it crossed public land was commenced September 21, 1981, and completed October 2, 1981 (Statement of Reasons at 2).

Mountain Bell contends that, under the facts of this case, BLM has no statutory or regulatory authority to require Mountain Bell to obtain a Federal right-of-way grant prior to laying the communication cable within the road right-of-way.

[1] Section 8 of the Act of July 26, 1866, 14 Stat. 253, former section 2477 of the Revised Statutes (R.S. 2477), 43 U.S.C. § 932 (1970) (repealed by section 706(a) of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA), 90 Stat. 2793), provided that: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." No action by the Federal Government was necessary, because R.S. 2477 was "a present grant which [took] effect as soon as it [was] accepted by the State. \* \* \* All that [was] needed for acceptance [was] 'some positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept \* \* \*.'" Hamerly v. Denton, Alaska, 359 P.2d 121, 123 (1961)." Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973) (en banc), cert. denied, 411 U.S. 917 (1973) (footnotes omitted).

Montana Highway 361 received such designation by Madison County in 1887, as noted above. Although R.S. 2477 was repealed by section 706(a) of FLPMA, sections 509(a) and 701(a) of FLPMA clearly protect rights-of-way existing on October 21, 1976. Section 509(a), 43 U.S.C. § 1769(a) (1982), states:

Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

Thus, Montana's highway right-of-way over Federal land is proper and secure and there has been no limitation of the grant originally made under R.S. 2477. Mountain Bell, 83 IBLA 67 (1984).

[2] As was the situation in Mountain Bell the issue before this Board is the scope of the right-of-way granted under R.S. 2477. In Mountain Bell we stated:

This issue was recently resolved in United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411 (9th Cir. 1984), wherein Mountain Bell was defendant-intervenor-appellee. The appeals court held that R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. \* \* \* In Gates of the Mountains, the question presented was whether a powerline without a Forest Service right-of-way, which had been laid along an R.S. 2477 road traversing public land, trespassed upon the rights of the United States. The Ninth Circuit held it did, reversing an opposite holding by the United States District Court for the District of Montana, reported at 565 F. Supp. 788.

Id. at 69. The only essential difference between the fact situation before us now and the fact situation of that case is the year in which the rights-of-way were granted. Whereas in Mountain Bell the R.S. 2477 right-of-way was granted in 1919, id. at 69, the one which is under consideration here was granted in 1887.

In Mountain Bell, we noted that, by the time of the grant at issue there, Congress had already determined that lines for telephone communication were not within the scope of an R.S. 2477 highway right-of-way and had excluded any implied borrowing of state law on the point. See the Act of February 15, 1901, 31 Stat. 790 (formerly codified at 43 U.S.C. § 959), which authorized the Secretary of the Interior to permit use of rights-of-way through public lands for telephone lines, and the Act of March 4, 1911, 36 Stat. 1253 (formerly codified at 43 U.S.C. § 961). <sup>1/</sup> We concluded that at least since 1901 the scope of an R.S. 2477 right-of-way grant has not encompassed the legal right to grant third-party rights-of-way. Id. at 71.

Under the facts of the present situation we conclude that rights-of-way obtained prior to 1901 pursuant to R.S. 2477 similarly do not contain a legal right on the part of the state to grant third-party rights-of-way. There is nothing in R.S. 2477 which invested a state with any right to create such rights-of-way. As did the U.S. Court of Appeals for the Ninth Circuit in United States v. Gates of Mountains Lakeshore Homes, Inc., supra, we cite Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982), which notes that any doubt as to the extent of the grant under R.S. 2477 must be

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<sup>1/</sup> The 1901 and 1911 statutes were repealed by section 706(a) of FLPMA, 90 Stat. 2793, effective Oct. 21, 1976.

resolved in favor of the Government. See United States v. Union Pacific Railroad Co., 353 U.S. 112, 116 (1957). 2/

As noted above, although R.S. 2477 was repealed by section 706(a) of FLPMA, sections 509(a) and 701(a) clearly protect rights-of-way existing on October 21, 1976. It is clear, however, that Congress fully intended for the Federal Government to continue granting rights-of-way for telephone communications systems. See 43 U.S.C. §§ 1761(a)(5), 1770(a) (1982).

Accordingly, we hold that appellant's telephone cable crossing or lying within an R.S. 2477 highway right-of-way requires a right-of-way under 43 U.S.C. § 1761 (1982) notwithstanding that permission to bury the cable along the road had been obtained from the county.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Montana State Office is affirmed. 3/

Will A. Irwin  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge.

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2/ Our decision in Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360 (1981), dealt with regulations promulgated under R.S. 2477 that precluded the holder of a highway right-of-way from granting a right-of-way for a telephone line and held that retroactive application of these regulations was warranted. Id. at 365. That rationale applies at least as forcefully in this case, where appellant's right-of-way application in 1981 came after the 1980 revision of the regulations in 43 CFR Part 2800 to conform to Title V of FLPMA.

3/ As to General Condition 6 of the right-of-way, to which appellant objected and reserved the right to contest, see Marathon Oil Co., 83 IBLA 137 (1984).

